



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAKURU**  
**CORAM: KWACH, TUNOI & SHAH, J.J.A**  
**CIVIL APPEAL NO. 327 OF 2002**  
**BETWEEN**

**KENYA POWER & LIGHTING CO. LIMITED.....APPELLANT**

**AND**

**ALLAN GEORGE NJOGU KAMAU.....RESPONDENT**

(Being an appeal from the judgment and decree  
of the High Court of Kenya at Eldoret (Etyang, J)  
dated 22nd day of October, 2002

in

H.C.C.C. NO. 160 OF 2000)

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**JUDGMENT OF THE COURT**

The respondent, *Allan George Njogu Kamau*, purchased from the *Hon. Francis Arap Tarar*, during the year 1992, an unregistered property now known as *Eldoret Municipality Block 1/166* measuring 0.311 of an hectare (hereinafter referred to as “the suit property”). The suit property was allocated to Hon. Tarar by the Municipal Council of Eldoret . It is not known how much Mr. Kamau paid to Hon. Tara r for the suit property. As the property was then unregistered the title was given direct to Mr. Kamau by the said Council presumably as a result of Hon. Tarar’s request. The title as issued is leasehold, for a period of 99 years from 1st August, 1992 (less last day) and was actually registered in the name of Mr. Kamau on 13th May, 1997 and a certificate of lease under the Registered Land Act was issued to him on the same day.

It was only when Mr. Kamau was selling the suit property to a society known as Fountain of Life Ministries that he allegedly realized that the suit property had on it an electricity sub-station put up by the appellant, Kenya Power & Lighting Company Limited (KPLC). The said society declined, for that reason, to buy the suit property. By reason of the sub-station being on the suit property 70% of it was not usable. This is common ground. Faced with this situation Mr. Kamau sought, compensation from KPLC. At first he asked for a sum of Shs.2,000,000/= as damages. When there was no response to Mr. Kamau’s letter of demand, he filed a suit in the superior court through his own law firm of A.G.N. Kamau & Company, Advocates. In that suit he sought the following reliefs.

**“(a) Value of the said plot at the resigning (sic) market price.**

**(b) General damages for trespass.**

**(c) Mesne profits to be determined by this Honourable court.**

**(d) Costs of this suit.”**

Mr. Kamau whilst giving evidence in the superior court stated that when he bought the suit property from Hon. Tarar he was not aware of an electricity substation being thereon but when he eventually visited the same he found that the sub-station occupied about three-quarters of the suit property. It is a matter of notoriety that one does not normally purchase a property without viewing it. There is evidence that as early as 1983 KPLC had put up on the suit property electricity lines with the permission of the then Ministry of Transport and Communications. It is immaterial whether Eldoret Municipal Council gave such permission for the purposes of this suit. What is material is that when Mr.

Kamau bought the suit property in 1992 the power lines were on the suit property and if he did not check on this before buying the suit property he cannot lay blame at the door of KPLC. Unfortunately the learned Judge who heard the case has made no finding on this material factor. He ordered that the suit property be transferred to KPLC upon payment by it to Mr. Kamau, a sum of Shs.1,000,000/-, which sum the learned judge arrived at as follows:

**(a) Value of the suit property                      Kshs.750,000/ -**

**(b) General damages for trespass Kshs.250,000/ -**

**Total Kshs.1,000,000/ -**

It is against this decision that KP & LC has appealed. Mr. Gitonga holding brief for Mr. Kibichy for KPLC has argued that the learned judge erred in not holding that KPLC had interest in the suit land by way of overriding interest as defined in section 30 (h) of the Registered Land Act, Cap 300, Laws of Kenya (RLA) which reads:

***“30. Unl ess the contrary is expressed in the register, all registered land shall be subject to such of the following over -riding interests as may for the time being subsist and affect the same, without there being noted on the register. –***

***(a) Not relevant***

***(g) Not relevant***

***(h) evantricity supply lines, telephone and telegraphic lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law:***

***Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.”***

It is clear to us that none of the parties to the suit considered the implication of Section 31 of RLA . This section as read with the proviso just reproduced above [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) 4 puts any purchaser on notice as regards any entry on the register relating to the land showing any of the overriding interests referred to in Section 30 of RLA. The point to note here is that at the time Mr. Kamau bought the suit property the land was unregistered. Therefore there could not have been any entry as regards any overriding interests. Mr. Kamau’s evidence in relation to the search he carried out at the Lands Office, Eldoret and finding no easements or restrictions is of no value, the suit property having been registered in 1997. We do not see how KPLC could have registered its interest when there was no title document given to any one until 1997. The reason why we have considered this issue is that no general damages for trespass could properly have been awarded when KPLC had power lines over the suit property prior to purchase thereof by Mr. Kamau. This is where we think the learned judge went wrong. There was no legal basis for the award of general damages.

Mr. Gitonga's argument as regards overriding interests under section 30 (h) of R.L.A. also does not stand in view of lack of registration until 1997 of the title to the suit property.

The suit in the superior court was argued rather haphazardly. The fact of nonregistration of title until 1997 was not considered. This led to the award of general damages. There was also no prayer for transfer of the suit property to KPLC. There was also no claim for any payment by KPLC for cost of removal of the so called substation. Yet all these factors were considered. It appears that no issues were framed. Framing of issues is mandatory. The reason for this is that the hearing can proceed in tune with the pleadings only after issues are crystallized. We have said it before and we say it again that the requirements of

Order XIV of the Civil Procedure Rules must be complied with as far as practicable before the hearing starts.

Although there was no claim by Mr. Kamau that KPLC buys out the suit property the hearing to a certain extent proceeded on the basis that KPLC was ready to buy out Mr. Kamau's interest in the suit land. Moses Diema Cheseto (DWI) said what follows:

***“If we were to re -route these lines, the amount of expenses would be Kshs.1,320,000/ -  
-. We are still offering the plaintiff the market value of this plot Shs.650,000/ -“***

KPLC seeks, in this appeal, setting aside the judgment of the superior court and in substitution therefore, an order dismissing the suit. It is true that there was no prayer in respect of what the learned Judge finally found. In view of the manner in which the suit proceeded in the superior court we have no alternative but to go by and apply equitable principles for the final disposal of the suit in the superior court. It is not in doubt that the suit property is almost worthless to Mr. Kamau. It cannot be denied that the power lines or the sub-station over the suit property existed long before Mr. Kamau acquired the property. It is a matter of notoriety that an intending purchaser ought to inspect the property before he/she buys it. We have pondered over the matter at length and have come to the conclusion that the only way we can do justice between the parties is to order KPLC to take over the suit property and pay Mr. Kamau a sum representing the open market value thereof. In this way KPLC will not have to pull down and relocate the structures it has installed on the suit property and Mr. Kamau will get what we consider to be a fair return of his investment. On the basis of the two valuation report produced at the trial which put the value at Shs. 750,000/= and 650,000/=, we assess the true value at Shs. 700,000/=.

For these reasons we allow this appeal, set aside the decree and substitute therefor orders in the following terms:-

- 1. KPLC to pay Mr. Kamau the sum of Shs. 700,000/= only;***
- 2. The said Shs. 700,000/= to be paid only upon Mr. Kamau executing a transfer of the suit property to KPLC;***
- 3. The costs of such transfer be borne by KPLC;***
- 4. KPLC to pay Mr. Kamau two -thirds of his taxed costs both here and in the superior court.***

**Dated and delivered at Nakuru this 21 st day of March, 2003.**

**R.O. KWACH**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**I c ertify that this is**

**a true copy of the original.**

**DEPUTY REGISTRAR**